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Before the
Federal Communications Commission
Washington, D.C. 20554

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JUL 17 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re	)	
	)	
Definition of an Over-the-Air	)	**RM** _____
Signal of Grade B Intensity for	)	
Purposes of the Satellite Home	)	
Viewer Act	)	

TO: The Commission

PRELIMINARY RESPONSE OF NATIONAL ASSOCIATION OF BROADCASTERS TO EMERGENCY PETITION FOR RULEMAKING FILED BY THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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NOTE: NRTC has already filed a copy of the CBS Inc. Court's May 13, 1998 Order

SUMMARY

Two federal District Courts have now held that PrimeTime 24 and its distributors such as DirecTV and NRTC have flagrantly violated the "unserved household" limitation of Section 119 of the Copyright Act by selling duplicative network programming to hundreds of thousands of ineligible subscribers. Instead of coming into compliance with the law, the PrimeTime 24/DirecTV/NRTC group asks that the law they have broken be eviscerated. Because Congress has already established the definition of "unserved household," the Commission does not have the authority to do what the PrimeTime 24 group asks. Even if the Commission had the relevant authority, it would be a grave and unprecedented mistake to gut the limitations created by Congress: it would jeopardize the network/affiliate system that has brought free television and local news to nearly all Americans, and it would be completely inconsistent with policies that the Commission has applied for more than 30 years in its network nonduplication and other program exclusivity rules.

Congress forbade satellite companies to deliver ABC, CBS, Fox, and NBC programming to "served" households because that activity jeopardizes the basic economics of free, over-the-air broadcasting. In drafting the Satellite Home Viewer Act ("SHVA"), Congress rejected urgings from the satellite industry to adopt a toothless "picture quality" standard for determining which households are unserved. Instead, Congress specified which households qualify as "served" by reference to specific signal strength levels set forth in FCC regulations as of 1988 (47 C.F.R. § 73.683(a)). Congress knew exactly what it was doing when it chose to incorporate those signal intensity levels by reference: it was adopting an enforceable, bright-line, objective

standard, just as a state may choose to use 21 years of age (not 20 years and 11 months, and not individualized determinations of "drinking readiness") as the standard for who may purchase alcoholic beverages.[1/]

A decision issued yesterday by the United States District Court for the Middle District of North Carolina shows that NRTC is completely wrong in claiming that the signal intensities specified by the Commission in 47 C.F.R. § 73.683(a) "were not intended to be used for purposes of identifying 'unserved households' under SHVA." Petition at 6. The Court ruled as follows:

> Although Section 73.683 concededly was drafted with other purposes in mind, Congress can clearly adopt by reference, in whole or in part, any portion of the Code of Federal Regulations which it considers relevant to defining a new statutory term. It is apparent that Congress has done so here. SHVA's reference to "an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission)" most naturally refers to the dBu's required for a signal of Grade B strength for each particular channel.
>
> ABC, Inc. v. PrimeTime 24, Joint Venture, (M.D.N.C. July 16, 1998), at 13.

The problems that have arisen in connection with satellite delivery of network programming to dish owners are not the product of any ambiguity in the standard chosen by

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1/ Recent empirical data confirms that Grade B intensity is an excellent objective proxy for acceptable picture quality, as the FCC itself concluded in setting Grade B levels several decades ago. See pp. 32-33 below.

Congress --- which the Commission lacks the power to alter in any event. Rather, satellite delivery of network programming has become a contentious issue because PrimeTime 24 and its distributors have completely ignored the law. The United States District Court for the Southern District of Florida summed up the pertinent facts as follows: "PrimeTime 24 knew of the governing legal standard, but nevertheless chose to circumvent it." May 13 Order at 29 (emphasis added). As the empirical evidence developed by broadcast engineer Jules Cohen demonstrates, the violations of law by PrimeTime 24 and its distributors have been enormous in scale.

By ordering PrimeTime 24 and its distributors finally to comply with the law, the federal Courts are in no way "usurping" any proper role of the Commission. Rather, these Courts are faithfully applying the statutory standard chosen by Congress 10 years ago -- and long flouted by PrimeTime 24 and its distributors.

Nor, contrary to NRTC's repeated claims, are these Courts in any way jeopardizing lawful competition between the satellite industry and the cable industry. Congress conclusively determined in 1988 (and reaffirmed in 1994) that satellite carriers may lawfully deliver network stations by satellite to households that qualify as "unserved" under the specific standards established by Congress, but not to anyone else. (Satellite carriers are free, of course, to assist their subscribers in obtaining local stations by non-satellite means; DirecTV has a campaign to do exactly that.) To the extent the Commission wishes to encourage additional forms of competition between satellite and cable with respect to retransmission of broadcast programming, it should encourage creation of a suitable statutory and regulatory regime for

local-to-local satellite retransmission of all broadcast stations. Lawful local-to-local retransmissions, unlike infringing importation of distant signals to served households, would offer a win/win solution for satellite companies, broadcasters, and consumers alike.

The Commission should understand that the NRTC petition is simply the latest in a series of ploys being used by PrimeTime 24 and its allies to try to obtain further delays in complying with the SHVA. Earlier, PrimeTime 24, after generating some concern in Congress about the "white area" issue, sought -- unsuccessfully -- to persuade the Florida Court not to enforce the Copyright Act because Congress might change the law. Now NRTC's "emergency" petition, which could have been filed at any time during the past several years,[2/] is providing PrimeTime 24 with its latest excuse for delay: PrimeTime 24 earlier this week filed its own "emergency" motion in Court to halt preliminary injunction proceedings pending resolution of the NRTC petition. See Defendant PrimeTime 24's Emergency Motion to Stay Preliminary Injunction Proceedings Pending Action by the Federal Communications Commission, CBS Inc. v. PrimeTime 24 (S.D. Fla. filed July 13, 1998) (copy attached). The Commission should decline the invitation to be used as a pawn in PrimeTime 24's effort to escape the consequences of its lawbreaking.

2/ Lawsuits seeking to enforce the Copyright Act against PrimeTime 24 and its distributors -- in which the "Grade B intensity" standard has been a central issue -- have been pending since early 1996. A motion seeking a national preliminary injunction against PrimeTime 24 has been pending since March 1997. During this period, both Congress and the Copyright Office have engaged in extensive hearings and deliberations on these issues. There is no possible reason -- other than a desire to generate additional delay -- for PrimeTime 24 and its allies to have waited to file the present petition on an "emergency" basis at this late date.

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TO: The Commission

PRELIMINARY RESPONSE OF NATIONAL ASSOCIATION OF BROADCASTERS TO EMERGENCY PETITION FOR RULEMAKING FILED BY THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

The National Association of Broadcasters hereby submits its preliminary response to the Emergency Petition filed by the National Rural Telecommunications Cooperative ("NRTC") on July 8, 1998.[3/]

I. INTRODUCTION

Congress adopted in 1988, and extended in 1994, a narrow compulsory license permitting satellite carriers such as PrimeTime 24 to deliver ABC, CBS, Fox, and NBC programming to dish owners, but only those in "unserved households." The purpose of this

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3/ NAB is filing this preliminary response on an extremely expedited basis because of the cynical way in which PrimeTime 24 is attempting to use the NRTC petition in Court. NAB, of course, reserves the right to make additional filings with respect to NRTC's radical and ill-considered proposal.

limitation is to ensure that satellite carriers do not interfere with the network/affiliate relationship that is a cornerstone of free, local over-the-air broadcasting.

PrimeTime 24 and its distributors such as DirecTV and NRTC have never complied with the restriction to "unserved households," or made any meaningful effort to do so. Instead, PrimeTime 24 and its distributors have sold network programming by satellite to anyone willing to say certain words (such as "I don't get an acceptable picture") over the telephone. Far from delivering network programming only to remote, rural customers, as NRTC depicts, PrimeTime 24 and its distributors have signed up millions of urban and suburban customers. With the explosive growth of small satellite dishes since mid-1994, the total noncompliance of PrimeTime 24 and its distributors with the Copyright Act has become an ever-growing threat to broadcast networks and their local affiliates throughout the United States. In the Washington area, for example, the bulk of PrimeTime 24's new signups are in the District of Columbia itself and its inner suburbs.

NRTC is a large distributor of DirecTV, which in turns sells the network packages offered by PrimeTime 24. (DirecTV is owned by Hughes Electronics, which is in turn owned by General Motors.) Selling PrimeTime 24 is a highly profitable business: the PrimeTime 24/DirecTV/NRTC group takes in approximately $6.67 per subscriber per month for the PrimeTime 24 network package, see DirecTV Web Site, www.directv.com, and owes copyright fees of only about $2.16 per subscriber per month. Across their many hundreds of thousands of subscribers, that leaves many millions of dollars each month to be divided up among PrimeTime 24 and its distributors.

PrimeTime 24 and its distributors are finally facing their day of reckoning in court for years of blatant copyright infringements. On May 13, 1998, the United States District Court for the Southern District of Florida granted a motion filed by the plaintiffs (CBS, Fox, an association of CBS stations, and five individual stations) for a preliminary injunction against further violations of the Copyright Act. And on July 10, 1998, the Court amplified on its May 13 Order in providing detailed instructions to the satellite companies about what they must do to comply with the Act.

Instead of apologizing for their years of lawlessness, PrimeTime 24 and its allies have decided to ask the Commission to change the rules after the fact. They have chosen NRTC to file this petition because they hope its supposedly "rural" status will distract the Commission from the pattern of reckless lawbreaking in which PrimeTime 24 and its distributors have long engaged.

As discussed below, there is no reason for the Commission to take any action in response to the NRTC petition. Congress has already established the definition of "unserved household" -- including incorporation of the specific FCC definition of "Grade B intensity" then in force -- and the Commission lacks the authority to change that statutory definition. In any event, NRTC's petition is utterly without merit. Congress has already chosen the best available objective substitute for the impossibly subjective determination of whether particular households can receive "acceptable" or "adequate" reception.

II. PREVENTING DUPLICATION OF NETWORK PROGRAMMING AVAILABLE FROM LOCAL STATIONS SERVES VITAL INTERESTS AND DOES NOT HINDER COMPETITION

The "unserved household" limitation that the NRTC asks the Commission to destroy is a key component of a longstanding federal policy: to protect local network stations -- which provide free television and local news to virtually all Americans -- against importation of duplicative network programming. As a matter of sound public policy, it is essential to retain strong and enforceable protections against such duplication, whether by cable systems, open video systems, satellite companies, or any other retransmission system.

A. Congress and the Commission Have Repeatedly Recognized the Vital Interests Served by the Partnership Between Broadcast Networks and Their Affiliates

Over the past 50 years, Congress and the Commission have worked to foster the development of a national system of free over-the-air broadcast stations to serve local communities around the country. In particular, Congress has long directed the Commission to promote "localism" in the broadcast industry "to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern." Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 663 (1994) (Turner I); see United States v. Southwestern Cable Co., 392 U.S. 157, 174 & n.39 (1968) (same). That policy has provided crucial public interest benefits. Only last year, the Supreme Court declared that

> Broadcast television is an important source of information to many Americans. Though it is but one of many means for

> communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.

Turner Broadcasting Sys. v. FCC, 117 S. Ct. 1174, 1188 (1997).

This success is largely the result of the partnership between broadcast networks and affiliated television stations in markets across the country. The programming offered by network affiliated stations is, of course, available over-the-air for free to local viewers, unlike cable or satellite services, which require substantial payments by the viewer. See Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 663 (1994) (Turner I); Communications Act of 1934 § 307(b), 48 Stat. 1083, 47 U.S.C. § 307(b). Although cable, satellite, and other technologies offer alternative ways to obtain television programming, "nearly 40 percent of American households still rely on broadcast stations as their exclusive source of television programming." Turner I, 512 U.S. at 663.

The network/affiliate system provides a service that is very different from nonbroadcast networks. Each network affiliated station offers a unique mix of national programming provided by its network, local programming produced by the station itself, and syndicated programs acquired by the station from third parties. H.R. Rep. 100-887, pt. 2, at 19-20 (1988) (describing network/affiliate system, and concluding that "historically and currently the network-affiliate partnership serves the broad public interest.") Unlike nonbroadcast networks such as Nickelodeon or USA Network, which telecast the same material to all viewers nationally, each network station provides a customized blend of programming suited to its

community -- in the Supreme Court's words, a "local voice." For example, stations in North Carolina provide vitally needed information to viewers about potential hurricanes, while stations in Montana do the same about impending blizzards. More recently, stations in Florida have provided a tremendous public service by tracking and providing constant coverage of the disastrous spread of fires in that state.

A key source of revenues for local network affiliates is the sale of local advertising time during network programs. Because network programs often command large audiences, the sale of local advertising slots during these programs is one of the most important ways in which stations earn revenues to stay in business and fund their local news, weather, and public affairs programming.

Networks and their local affiliates also cooperate in a wide variety of other ways to encourage "audience flow" and to promote one another's programming. For example, networks often provide their affiliates with the opportunity, during their 10-11 p.m. programs, to offer a "local news tease" promoting that day's 11 p.m. local news program. These various forms of cooperation can succeed, however, only if viewers are watching their own local stations.

A variety of technologies have been developed or planned -- including cable, satellite, and open video systems ("OVS") -- that, as a technological matter, enable third parties to retransmit distant network stations into the homes of local viewers. Whenever those technologies posed a risk to the network/affiliate system, Congress or the Commission (or both)

has acted to ensure that the retransmission system does not import duplicative network programming from distant markets.

In the case of cable television, for example, the Commission has since the mid-1960's imposed "network nonduplication" rules on cable systems. 47 C.F.R. §§ 76.92-76.97 (1996). As the Commission explained when it strengthened the network nonduplication rules in 1988:

> [I]mportation of duplicating network signals can have severe adverse effects on a station's audience. In 1982, network non-duplication protection was temporarily withdrawn from station KMIR-TV, Palm Springs. The local cable system imported another network signal from a larger market, with the result that KMIR-TV lost about one-half of its sign-on to sign-off audience. Loss of audience by affiliates undermines the value of network programming both to the affiliate and to the network. Thus, an effective non-duplication rule continues to be necessary.

Report and Order, In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Gen. Docket No. 87-24, ¶ 117, 3 FCC Rcd. 5299, 5319 (released July 15, 1988), aff'd, 890 F.2d 1173 (D.C. Cir. 1989); see also Southwestern Cable Co., 392 U.S. at 165; Wheeling Antenna Co. v. WTRF-TV, Inc., 391 F.2d 179, 183 (4th Cir. 1968). Similarly, when considering the possible entry by telephone companies into the multichannel video business through open video systems, Congress in 1996 specifically directed the FCC to apply its program exclusivity rules, including its network nonduplication, syndicated exclusivity, and sports blackout rules, to OVS operators. Telecommunications Act of 1996, Pub. L. 104-104, § 653(b)(1)(D).

B. The Satellite Home Viewer Act

In the 1980s, satellites emerged as a new method of retransmitting broadcast stations to viewers. As with cable (and later with OVS), Congress immediately recognized that satellite retransmission, if not narrowly limited, could destroy the network/affiliate system that Congress and the Commission have consistently sought to preserve. Accordingly, in the Satellite Home Viewer Act ("SHVA") (creating Section 119 of the Copyright Act), Congress crafted a special compulsory license for the satellite carrier industry, but strictly limited the license so that only viewers who could not receive their local stations over the air (so-called "unserved households") -- and no one else -- would be eligible to receive network stations by satellite. See 17 U.S.C. § 119(d)(10); Satellite Home Viewer[] Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) ("The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship") (emphasis added).

The special compulsory license in Section 119 of the Copyright Act gives satellite carriers an extraordinary privilege: to retransmit and sell to dish owners copyrighted television programming created or purchased by the ABC, CBS, Fox, and NBC networks. Satellite companies have no role in creating this programming, and need not purchase it in the marketplace. Congress' sensible decision to limit that privilege to "unserved households" was intended to ensure that satellite carriers would not jeopardize the network/affiliate system by duplicating the network programs offered by local network stations.

To accomplish that purpose, Congress adopted a simple, objective test for determining eligibility under the SHVA. Congress knew that if it established a vague or debatable standard for "unserved households," enforcement of the law would be impossible. Congress therefore chose a strictly objective definition of which households qualify as "unserved."

The definition of "unserved household" has two prongs, the first of which -- relating to "Grade B intensity" -- is the focus of the NRTC petition.[4/] That prong limits delivery of network programming by satellite to households that "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network." 17 U.S.C. § 119(d)(10). As discussed in the next section, Congress consciously and deliberately chose a specific, objective, signal strength standard.

C. Congress Knew Precisely What It Was Doing in Adopting An Objective Test of Grade B Intensity

When Congress wrote the definition of "unserved household" in 1988, it carefully considered -- and expressly rejected -- a subjective test for eligibility to receive network service. The satellite industry had urged Congress to adopt a subjective standard that

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4/ The second portion of the definition of "unserved household" requires that the customer not have obtained network programming by cable within 90 days before signing up for satellite delivery of network programming. 17 U.S.C. § 119(d)(10). Congress imposed this restriction to discourage subscribers from switching from local to distant network stations. See H.R. Rep. 100-887, pt. 1, at 27 (1988).

would rely on statements by viewers that they "cannot receive an adequate over-the-air television signal."[5/] Congress rejected that proposal, however, because self-reporting of subjective opinions about whether signals were "adequate" would have provided no meaningful protection for the network/affiliate system. See May 13 Order at 14 (discussing legislative history); July 16th Memorandum Opinion at 22 (same).

Instead of adopting the "sell to anyone willing to say they get an inadequate signal" approach urged by the satellite industry, Congress chose a strictly objective standard for which households could lawfully be provided with network programming by satellite carriers. Congress sensibly chose the same objective standard -- Grade B intensity -- that the Commission has long used as a proxy for "adequate" or "acceptable" reception. See 47 C.F.R. § 73.683 (defining "Grade B" intensity as median signal strength of 47 dBu for Channels 2-6, 56 dBu for Channels 7-13, and 64 dBu for Channels 14-69).

Incredibly, the NRTC asserts that the Commission's definition of Grade B intensity in Section 73.683(a) was "not intended to be used for purposes of identifying 'unserved households' under the SHVA." NRTC Petition at 6.[6/] That is completely false. Congress

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5/ Letter from PrimeTime 24 to Michael Remington, House Judiciary Committee (May 19, 1988).

6/ Similarly, NRTC falsely states that Grade B field strength was "never intended to define an 'over-the-air signal of grade B intensity' for purposes of the SHVA." Petition at 8. It also claims, irrelevantly, that "nothing in Section 73.683 was ever intended by the Commission to define 'Grade B intensity' for purposes of identifying 'unserved households' under the SHVA. But the point is that whatever the Commission may have "intended," **Congress** decided to use the signal strengths identified in Section 73.683 as the test for eligibility under SHVA.

defined an "unserved household" (in relevant part) as one that cannot receive a signal of Grade B intensity as defined by the FCC. 17 U.S.C. § 119(d)(10). In adopting that language, Congress specifically cited the particular definition of "Grade B intensity" the FCC had adopted, which was (and is still) codified in Section 73.683 of the Commission's rules. See H.R. Rep. No. 100-887, at 26 (1988).

When Congress amended and extended Section 119 of the Copyright Act in 1994, it reaffirmed that "Grade B intensity" is an objective test of signal strength. H.R. Rep. No. 103-703, at 13 (1994) ("This is an objective test, accomplished by actual measurement.") (emphasis added); S. Rep. No. 103-407, at 9 n.4 (1994) (Grade B intensity is an "objective test") (emphasis added).

The decision issued yesterday by the ABC, Inc. v. PrimeTime 24 Court conclusively refutes NRTC's claim that the signal intensities listed in 47 C.F.R. § 73.683(a) "were not intended to be used for purposes of identifying 'unserved households' under SHVA." Petition at 6. The Court ruled as follows:

> Although Section 73.683 concededly was drafted with other purposes in mind, Congress can clearly adopt by reference, in whole or in part, any portion of the Code of Federal Regulations which it considers relevant to defining a new statutory term. It is apparent that Congress has done so here. SHVA's reference to "an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission)" most naturally refers to the dBu's

required for a signal of Grade B strength for each particular channel.

ABC, Inc. v. PrimeTime 24, at 13 (M.D.N.C. July 16, 1998), at 13.

D. The NRTC's Attack on "Grade B *Contours*" Completely Misses the Point

The NRTC devotes much of its petition (e.g., pp. 6-9, 12, 13, 14) to criticism of the supposed use of predicted Grade B *contours* for determining eligibility under the Satellite Home Viewer Act. Among the NRTC's many attacks on "Grade B contours," for example, is the following: "[i]t would be patently unfair . . . to terminate service across-the-board to all subscribers *within the Grade B contour*." (Petition at 12.)

In attacking "Grade B contours," the NRTC is simply knocking down a straw man. Congress did not make "unserved household" status dependent on whether anyone lived inside a station's predicted Grade B contour, nor does the Florida Court's ruling do so. Rather, Congress made eligibility depend on whether a household can receive a signal of Grade B intensity with a rooftop antenna -- a standard the Court has faithfully applied.

Congress was well aware of the difference between Grade B contours and Grade B intensity. For example, here is what the House Judiciary Committee said in its Committee Report about the extension of SHVA in 1994:

> A network station's predicted Grade B contour must be distinguished from a signal of Grade B intensity. The term "predicted Grade B contour" as used in this Act refers to the area,

> referred to currently in Rule 73.684 of the rules of the Federal Communications Commission, as the area predicted to receive a signal from a network station of at least Grade B intensity. By contrast, the definition of an "unserved household" in § 119(d)(10) refers to the use of a conventional outdoor rooftop receiving antenna to receive "an over-the-air signal of grade B intensity" as defined by the FCC . . . .
>
> H.R. Rep. No. 103-703, at 14 n.36 (emphasis added).

E. The Commission Cannot Alter the Meaning of "Grade B Intensity" As Adopted by Congress

When Congress enacted the Satellite Home Viewer Act in 1988, it defined an "unserved household," for purposes of the Act, as one that was unable to receive "through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network." See 17 U.S.C. § 119(d)(10) (emphasis added). As discussed above, Congress explicitly identified the particular existing regulation it was adopting (47 C.F.R. § 73.683), see H.R. Rep. 100-887, at 26 (1988), and repeatedly described the statutory test as an objective standard of signal intensity. See H.R. Rep. 103-703, at 13 (1994); S. Rep. No. 103-407, at 9 n.4 (1994) .

Notably, Congress did not ask the Commission to engage in any rulemaking about Grade B intensity, or delegate any authority to the Commission to redefine that standard as applied to the Satellite Home Viewer Act. Rather, Congress specifically adopted the FCC's longstanding recitation of "Grade B" signal strengths -- e.g., 47 dBu as the "Grade B" minimum

signal strength for Channels 2-6 -- as it then existed. Any subsequent amendment by the Commission to the definition adopted by Congress would therefore have no impact on the meaning of "Grade B intensity" as adopted by Congress. See, e.g., Hassett v. Welch, 303 U.S. 303, 314 (1938) (stating the "well settled canon" that "'[w]here one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, . . . [s]uch adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent.'") (quoting Sutherland Stat. Constr. (2d ed.) at 787-88) (emphasis added); Curtis Ambulance of Florida, Inc. v. Board of County Commissioners of Shawnee County, 811 F.2d 1371, 1378 (10th Cir. 1987) (same); Bexar County Criminal District Attorney's Office v. Mayo, 773 S.W.2d 643, 643-44 (Tex. Ct. App. 1989) ("Where one statute incorporates another by reference, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact."); Sutherland Stat. Constr. § 51.08 (5th ed.) ("A statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments within the statute.") (emphasis added).

III. PrimeTime 24, DirecTV, and NRTC Have Grossly Abused the Compulsory License

The NRTC complains that the SHVA "does not provide clear guidance on which households may lawfully receive network signals by satellite." Petition at 5. That is false:

Congress provided very clear guidance, but PrimeTime 24 and its distributors such as DirecTV and NRTC have refused to follow it. That is why broadcasters have been forced to go to court to obtain relief against the satellite industry's massive violations of the Copyright Act.

The vast scale of these violations can be illustrated in two different ways. First, broadcasters have carried out signal intensity tests -- following the procedures specified by the Commission in 47 C.F.R. § 73.686 -- at the locations of more than 500 randomly selected PrimeTime 24 subscribers in five markets. The results of these tests are described in the Expert Report of Jules Cohen, copies of which are being provided to the Commission along with this document. Mr. Cohen supervised signal intensity tests at approximately 100 randomly selected locations in each of five markets: Miami, Florida; Charlotte, North Carolina; Pittsburgh, Pennsylvania; Baltimore, Maryland; and Raleigh, North Carolina. The percentages of these randomly selected subscribers who received a signal of at least Grade B intensity were as follows:

Miami:	**100%**
Charlotte:	**98%**
Pittsburgh:	**59%**
Baltimore:	**91%**
Raleigh:	**95%**[7/]

7/ As Jules Cohen explains, the Pittsburgh data represents not a typical case but an extreme worst case: a high-band UHF station (Channel 53) operating in perhaps the most difficult terrain of any station in the United States. See Expert Report of Jules Cohen, ¶ 26. PrimeTime 24 itself has endorsed Charlotte as a much more typical market, see id. at ¶ 25. In that market, 98% of PrimeTime 24's randomly selected subscribers were measured to receive a

(continued...)

In other words, random testing of PrimeTime 24 subscribers in five different markets showed that the overwhelming majority could easily receive a signal of Grade B intensity from their local stations. In fact, most could receive a signal of *Grade A* intensity. See Expert Report of Jules Cohen.

Second, Mr. Cohen has supervised the creation of Longley-Rice propagation maps -- which take into account the detailed terrain surrounding a broadcast tower -- and used "geocoding" to plot the locations of PrimeTime 24 subscribers on the same maps. These maps have been created using the standard parameters specified by the FCC in OET Bulletin 69.[8/] Mr. Cohen's Expert Report contains such maps for more than 40 representative television stations. These maps show that satellite carriers are routinely signing up large numbers of subscribers not in remote rural areas -- as NRTC claims -- but in urban and suburban areas that are obviously served by their local station's over-the-air signals. In the Washington area, for example, PrimeTime 24 has signed up thousands of subscribers in the District of Columbia and the innermost Maryland and Virginia suburbs. As Mr. Cohen's maps show, this same pattern of abuse by PrimeTime 24 is uniformly replicated in television markets, large and small, across the United States.

[7/] (...continued)
signal of Grade B intensity.

[8/] NRTC falsely asserts that "[u]se of . . . Longley-Rice maps is problematic because [they] are derived through the calculation of numerous variables, many of which are not set by the FCC Rules." Petition at 14. NRTC is apparently unfamiliar with OET Bulletin 69.

Ironically, although NRTC purports to represent the interests of viewers in "rural" areas, the infringements being committed by the PrimeTime 24/DirecTV/NRTC group are having their greatest impact on network stations that serve viewers in rural areas. In the Missoula, Montana DMA, for example, PrimeTime 24's imported CBS stations achieved Nielsen ratings 12% of those of the local CBS station during the February 1998 sweeps period -- in part through "scooping" the local CBS station by offering Olympics coverage at an earlier time from a CBS station from Pennsylvania. In Missoula, as in every other market, the great majority of PrimeTime 24/DirecTV/NRTC subscribers are being served unlawfully.

The United States District Court for the Southern District of Florida has determined, in ruling on plaintiffs' motion for a preliminary injunction, that PrimeTime 24 and its distributors (such as DirecTV, Echostar, and NRTC) have grossly violated the limitations imposed by the Copyright Act. Here are some of the Court's findings:

- "There are a variety of reasons, unrelated to being an 'unserved household,' why a customer might sign up for PrimeTime 24." (May 13 Order at 20.)
- "Plaintiffs' evidence indicates that PrimeTime 24 is broadcasting copyrighted network programming to hundreds of thousands of subscribers who receive a signal of grade B intensity as defined by Congress." (May 13 Order at 29)
- "Th[e] evidence demonstrates that PrimeTime 24 knew of the governing legal standard, but nevertheless chose to circumvent it." (May 13 Order at 29.)
- "PrimeTime 24 cannot create its own definition of the term 'unserved household' and then supply its services to anyone who fits within that definition." (May 13 Order at 30 n.14.)